

No. 15971.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

WILSHIRE HOLDING CORPORATION,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

Petition to Review a Decision of the Tax Court of the
United States.

APPELLANT'S REPLY BRIEF.

MURRAY M. CHOTINER and

RUSSELL E. PARSONS,

600 Fox Wilshire Theatre Bldg.,

202 South Hamilton Drive,

Beverly Hills, California,

Attorneys for Appellant,

Wilshire Holding Corporation.

FILED

AUG 21 1958

PAUL P. O'BRIEN, CLERK

TOPICAL INDEX

	PAGE
Conclusion	7

TABLE OF AUTHORITY CITED

CASE	
Oesterreich v. Commissioner of Internal Revenue, 226 F. 2d 798	2, 3

No. 15971.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

WILSHIRE HOLDING CORPORATION,
Petitioner and Appellant,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

Petition to Review a Decision of the Tax Court of the
United States.

APPELLANT'S REPLY BRIEF.

Appellee, in his Brief (p. 7), states that it is "surely an unreasonable assumption" that the seller (Oesterreich) was willing to sell land worth \$75,000 for payments totalling \$75,000, to be paid at the rate of about \$1,000 a year for nearly 70 years in the future.

The answer to this argument is simply this: The *real* unreasonableness of the situation is that the parties and their predecessors in interest thought they had entered into a lease and acted as though they had entered into a lease. They agreed that the sum of \$679,380 would be paid to Oesterreich for the use of property that was worth only \$75,000 at the time the contract was executed in 1929. For almost twenty years the parties or their predecessors in interest never had any question raised as to whether the contract was a lease.

The Tax Court agreed that it was a lease.

However, the Circuit Court saw fit to rewrite the contract so as to make it a sale instead of a lease. Therefore, in all equity, the Court in rewriting the lease, should determine what portion of the payments being made to Oesterreich constituted payments to acquire title, and what portion of the payments constituted interest, carrying charge or rent.

Appellant respectfully urges that it is a most unreasonable assumption and requirement that \$679,380 should be paid to acquire title to a piece of real property that no one contends was worth more than \$75,000 at the time the contract was executed.

The Circuit Court in its decision reversing the Tax Court stated clearly, "Certainly a *part* of each payment is going toward the acquisition of this land, and to *this extent* Wilshire Corporation does have an equity." (*Oesterreich v. Commissioner*, 226 F. 2d 798; italics ours.)

This language of the Court's opinion leaves no room for doubt that the Circuit Court felt that only a part of the \$679,380 was going toward the acquisition of title.

The language of the Court, together with salient features of the case showing that the parties did not intend a sale requires a further determination of what part of the payments is going toward the acquisition of title.

The salient features showing that the parties intended to lease are:

1. During the calendar years 1929 to 1946, inclusive, Wilshire Amusement Corporation and Wilshire Holding Corporation entered all amounts paid or payable on ac-

count of their obligations under Exhibit 1 as rental expenses upon their books of account, and reported said amounts as rental expense in their income tax returns for said years. [Stip. Par. 8, p. 35, and pp. 68-69.]*

2. Wilshire Holding Corporation in its returns for the years under consideration here, 1945 and 1946, deducted the payments as rent. [Stip. Par. 10, p. 35.]

3. Oesterreich entered all amounts paid or payable by Wilshire Amusement Corporation and Wilshire Holding Corporation on account of their obligations under Exhibit 1 during the years 1929 to 1946, inclusive, as rental income upon her books of account, and reported said amounts as rental income on her income tax for said years. [Stip. Par. 9, p. 36; pp. 68, 126-127.]

4. In or about January of 1929 Albert J. Chotiner and Albert H. Chotiner informed W. Frank Moulton, who was at that time associated with the W. S. Hancock Company, that they proposed to construct a theatre in the Wilshire-La Cienega area and that they sought to enter into a long term ground lease for the land upon which the theatre would be built. [Dep. pp. 6, 11.]

5. Mr. Moulton, the real estate broker, canvassed the area and learned that Mrs. Oesterreich owned three lots on Wilshire and Hamilton. Mrs. Oesterreich informed Mr. Moulton that she was willing to enter into a long term lease but did not want to sell the land. [Dep. pp. 11, 33.]

6. Mr. Moulton reported back to the Chotiners and thereafter arranged a meeting between the parties in his

*The references are to the record in the companion case of *Oesterreich v. Commissioner* (Circuit Court No. 13924), 226 F. 2d 798.

office which was cater-cornered from the Wilshire and Hamilton lots owned by Mrs. Oesterreich. [Pp. 144-145.]

7. The Chotiners informed Mrs. Oesterreich that they desired to build a 1200-seat house and that they wished to lease her land. Mrs. Oesterreich informed the Chotiners that she was willing to enter into a long term ground lease if suitable terms could be arranged. [Pp. 145, 148.]

8. During the course of the negotiations Mrs. Oesterreich on several occasions stated that she did not expect to be alive at the end of the term of the lease and was indifferent as to the disposition of the fee at that time but that she was interested in securing a substantial rental during her lifetime. [P. 154; Dep. pp. 24, 27, 50, 64.]

9. At no time during the course of the negotiations did the Chotiners offer to buy the land. [Pp. 134, 160, 165; Dep. pp. 23, 31.]

10. At no time during the course of the negotiations did Mrs. Oesterreich offer to sell the land. [P. 146; Dep. p. 22.]

11. At no time during the course of negotiations did either of the parties discuss the sale of the land. [P. 146; Dep. pp. 22, 24-25.]

12. At no time during the course of the negotiations did the parties discuss the value of the land. [Pp. 165-166; Dep. pp. 26-27.]

13. The land at the time that the lease was negotiated had a value of not less than \$50,000 and not more than \$75,000. [P. 74; Dep. pp. 18, 46.]

14. The real estate agent, Mr. Frank W. Moulton, was compensated by the landlord. He was paid a commission for finding a tenant and negotiating a lease. His original commission was computed on the basis of finding a tenant for his principal, Mrs. Oesterreich. [Dep. pp. 19-22, 56, 63.]

15. Oesterreich acquired title to Lots 552, 553, and 554, Tract No. 4988, as per Map recorded in Book 54, pages 98 and 99 of Maps, Official Records of Los Angeles County, by grant deeds dated January 9 and recorded January 30, 1926. Mrs. Oesterreich paid a total consideration of \$20,000.00 for said three lots. Prior to September 11, 1929, Mrs. Oesterreich expended a total sum of \$4,235.05 for paving and lighting assessments properly chargeable to capital account in respect to said lots, so that her adjusted basis for said lots on September 11, 1929, was \$24,235.05. [Stip. Par. 1, pp. 32-33.]

16. Wilshire Amusement Corporation caused the northerly 10 feet and the southerly 40 feet of Lot 555 of said Tract No. 4988 to be conveyed to Mrs. Oesterreich by grant deeds dated September 11, 1929, and recorded September 13, 1929. Wilshire Amusement Corporation caused the northerly 40 feet of Lot 556 of said Tract No. 4988 to be conveyed to Mrs. Oesterreich by grant deed dated October 20, 1929, and recorded November 15, 1929. Wilshire Amusement Corporation paid cash in the amount of \$19,150 for said parcels of land, plus the sum of \$500 for the removal of restrictions. [Stip. Par. 4, p. 34.]

17. The foregoing three parcels of land acquired by the Chotiners *et al.*, at an aggregate cost of \$19,650

were conveyed to Mrs. Oesterreich as part of the consideration for the making of the lease and its terms and as additional security for the performance of the terms, conditions and provisions of the lease. [Ex. 6.]

18. The building constructed by the lessee as required by the lease is situate on all five lots; the three lots belonging to Mrs. Oesterreich and the lots purchased by the Chotiners. [Pp. 131-132.]

To hold that all of the payments being made to Oesterreich are going toward acquiring title means that Wilshire Holding Corporation is paying a second time for the two lots purchased by the Chotiners and conveyed to Oesterreich. This would be a most unreasonable requirement. It is beyond all reasonable comprehension that a party should be expected to pay an exorbitant price to acquire land for which it had already paid a reasonable value.

19. The document embodying the agreement of the parties was thereafter duly recorded in the office of the County Recorder on November 19, 1929, as a lease. [Stip. Par. 3, p. 33.]

20. The lease in question was executed by the parties after consultation and upon advice of their legal counsel, Meyer Willner ~~from~~ ^{FOR} Mrs. Oesterreich and Mr. Binford for the Chotiners. [Pp. 110-111.]

21. Mrs. Oesterreich and Wilshire-Hamilton Properties, Inc., the predecessor of the Wilshire Holding Corporation, executed a deed of trust as security for the construction loan on November 1, 1929. The deed of trust referred to Mrs. Oesterreich as the "grantor" and stated that the "grantor is the owner" of the real property; that a leasehold interest was created by the lease

referred to as the "Oesterreich lease" dated September 11, 1929, executed by Walburga Oesterreich as lessor. [Ex. 7, pp. 114-115; p. 155.]

22. The ground rent payments made pursuant to the lease were paid to the Security-First National Bank of Los Angeles in accordance with the Assignment of Rents executed by Mrs. Oesterreich. [Ex. 14, pp. 169-170.]

23. Wilshire Holding Corporation and Mrs. Oesterreich have always heretofore considered the payments as rent as between themselves. [Stip. Pars. 8-9, p. 35; pp. 68-69, 126-127.]

Conclusion.

Based on the Court's opinion reversing the Tax Court, appellant respectfully urges that its computation of the deficiencies due for income tax and declared value excess profits tax is correct; in the event the Court has any question as to the correctness of the computation, the matter should be remanded to the Tax Court for the purpose of making a determination of what part of each payment made by Wilshire Holding Corporation to Oesterreich is going toward the acquisition of the land so it may be determined what portion of the payments shall be charged to capital as the purchase price.

Respectfully submitted,

MURRAY M. CHOTINER and

RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

*Attorneys for Appellant, Wilshire
Holding Corporation.*

